LIGHT STYLE SDN BHD

v.

KFH IJARAH HOUSE (MALAYSIA) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ROHANA YUSUF J
[SUIT NO: D4-22A-401-2008]
6 MARCH 2009

ISLAMIC LAW: *Islamic banking - Murabaha Sale Agreements - Validity - Provision of financing facilities per se - Whether constituted 'banking business' - Whether offending laws on banking and Islamic banking - Whether unenforceable - Banking and Financial Institutions Act 1989, ss. 2, 4, 6(4), 125 - Islamic Banking Act 1983, ss. 2, 3 - Money Lenders Act 1951, s. 2*

COMPANY LAW: *Winding up - Injunctive relief - Application for injunction against winding up petition - Whether petition vitiated by duplicity - Applicable principles - "Triable issue" test in American Cyanamid - Whether inapplicable - Whether plaintiff to establish prima facie evidence to dispute debt - Companies Act 1965, s. 218*

CIVIL PROCEDURE: *Injunction - Interim injunction - Interim injunction to restrain winding up petition - Applicable principles - "Triable issue" test in American Cyanamid - Whether inapplicable - Whether plaintiff to establish prima facie evidence to dispute debt - Companies Act 1965, s. 218*

WORDS & PHRASES: *"Banking Business" - Meaning of - Section 2 Banking and Financial Institutions Act 1989 - Section 3 Islamic Banking Act 1983*

The plaintiff had obtained a revolving trade line facility of RM5.6 million from the defendant and to that end had executed 17 separate Murabaha Sale Agreements with the defendant. The plaintiff defaulted in the repayment and the defendant filed two civil suits against the plaintiff seeking to enforce the contract in 6 of the 17 Murabaha Sale Agreements. In addition, while the civil suits were pending, the defendant also invoked s. 218 of the Companies Act 1965 ('s. 218 notice') and initiated winding up proceedings against the plaintiff in respect of 9 other Murabaha Sale Agreements. The defendant was aware of the distinctiveness of the agreements forming the basis of the s. 218 notice and the civil suits respectively, but nonetheless – in the application for an

A interim injunction to prevent the defendant from proceeding with the s. 218 notice herein – did not allude to that obtaining position and proceeded to argue that the s. 218 notice was vitiated by duplicity by virtue of the civil suits. This apart the plaintiff also argued that the financing transactions as encapsulated in the B Murabaha Sale Agreements had contravened the Banking and Financial Institutions Act 1989 ('BAFIA'), the Islamic Banking Act 1983 ('IBA') and Money Lenders Act 1951 ('MLA'), and were hence unenforceable. *Inter alia,* the plaintiff complained that since the defendant was registered under s. 2(1) and Third Schedule of C BAFIA to carry out *leasing business*, the defendant had no legal clout to carry out *banking business*, which included *financing*, given that the later business could not be provided without a valid license having been issued by Bank Negara Malaysia under s. 6(4) of BAFIA. The primary issues that arose were: (i) whether the D s. 218 notice was inflicted with duplicity; (ii) whether the plaintiff was in any way guilty of material non-disclosure, and if so whether it was fatal to its application herein; and (iii) whether the defendant had carried out *banking business* without a license and had consequently offended BAFIA or IBA for that matter.

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Held (dismissing application for injunctive relief):

(1) The plaintiff had submitted erroneously on allegations of multiplicity of proceedings and had misled the court as to the F facts. This is because the subject of application, though based on similar Murabaha Sale Agreements, did not relate to the same agreements as in the two civil suits. Clearly, the issue of multiplicity of proceedings is totally unwarranted and misleading. (para 8)

G **(2)** The duty to make full and frank disclosure of material facts is a requirement that the plaintiff must comply in an application of this nature. The plaintiff's failure to disclose that the agreements in the civil suits and the s. 218 notice are not the same and instead suggests otherwise when alleging multiplicity H of proceedings amounts to a clear failure to provide a full and frank disclosure and is fatal to the plaintiff's case. (para 9)

(3) From the wording of s. 2 of BAFIA, *banking business* entails the acts of all the three transactions mentioned therein, ie. that of I receiving deposits, paying and collecting cheques drawn by the customer and providing financing or such other business so prescribed by the Minister – and the three limbs must be read

conjunctively. It follows that even if it is true that the defendant is providing financing vide the Murabaha Sale Agreements, the provision of financing *per se* is not *banking business* and requires no license under s. 6(4) of BAFIA. (para 17)

(4) It is to be noted that even the definition of '*finance company business*' in s. 2 BAFIA entails receiving of deposit and provision of credit, leasing, hire purchase or acquiring rights and interests in hire purchase. There is therefore no basis to say that the defendant has contravened any of the provisions in BAFIA in the transaction with the plaintiff. In any case, assuming there is such a contravention, the same would have been saved by s. 125 BAFIA which stipulates 'no contract, agreement or arrangement entered into in contravention of any provision of this Act shall be void sole by reason of such contravention' (*Coramas Sdn Bhd v. Rakyat First Merchant Bankers Bhd & Anor* (foll)). (paras 18 & 19)

(5) *Banking business* in IBA also necessitates that it is a business of taking deposit and providing financing as well as issuing cheques. Providing financing alone is not therefore carrying out *banking business* under the IBA. Thus, despite the exhs. CWM01, CWM02 and CWM03 advertising the defendant as providing financial facilities herein, it cannot be said that the defendant is operating *banking business* under the IBA. (para 24)

(6) There is nothing in the Murabaha Sale Agreements that can be construed to suggest a money lending transaction. In any case, if the plaintiff itself was conspiring with the defendant to circumvent the MLA, the plaintiff is doing that at its own peril and is not entitled to any equitable relief on account thereof. (paras 25, 27 & 28)

(7) In deciding whether to grant the injunctive relief sought by the plaintiff, the court should not apply the 'triable issue' test as propounded in *American Cyanamid Company v. Ethicon*. It is axiomatic that a winding up petition may be restrained by way of injunction where its presentation constitutes an abuse of the court process. That being so, it is not sufficient for the applicant to merely raise a triable issue to obtain such relief. The plaintiff must indeed establish that there is a *bona fide*

dispute of the debt on substantial grounds (*Tan Kok Tong v. Hoe Hong Trading Company Sdn Bhd* (foll)). Here, no attempt has been made to raise a *bona fide* dispute of the debt or that the plaintiff is solvent. (paras 24 & 33)

Case(s) referred to:

American Cyanamid Company v. Ethicon [1975] 2 AC 396 ***(refd)***

Arab-Malaysian Merchant Bank Bhd v. Silver Concept Sdn Bhd [2006] 8 CLJ 9 HC ***(refd)***

Coramas Sdn Bhd v. Rakyat First Merchant Bankers Bhd & Anor [1994] 2 CLJ 143 SC ***(refd)***

Dato' Abd Rahim Mohamad v. Abdul Farish Rashid [2009] 1 CLJ 395 CA ***(refd)***

Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd [1987] 1 CLJ 123; [1987] CLJ (Rep) 102 SC ***(refd)***

Koh Kim Chai v. Asia Commercial Banking Corporation Limited [1980] 1 LNS 128 ***(refd)***

Koh Kim Chai v. Asia Commercial Banking Corp Ltd [1984] 1 CLJ 281; [1984] 1 CLJ (Rep) 18 PC ***(refd)***

Malayan Banking Bhd v. Red Box (M) Bhd [2000] 6 CLJ 21 HC ***(refd)***

Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals [2001] 3 CLJ 248 CA ***(refd)***

Molop Corporation Sdn Bhd v. Uniperkasa (Malaysia) Sdn Bhd [2003] 1 LNS 280 HC ***(refd)***

Natseven TV Sdn Bhd v. Television New Zealand Ltd [2001] 4 CLJ 722 HC ***(refd)***

PP Consultants Pty Ltd v. Finance Sector Union [2000] HCA 59 ***(refd)***

RHB Sakura Merchant Bankers Bhd v. Tan Sri Dato' Ting Pek Khiing (No 1) [2004] 2 MLJ 315 ***(refd)***

Tan Kok Tong v. Hoe Hong Trading Company Sdn Bhd [2007] 2 CLJ 305 CA ***(refd)***

United Dominions Trust Ltd v. Kirkwood [1996] 1 All ER 968 ***(refd)***

Legislation referred to:

Banking and Financial Institutions Act 1989, ss. 2(1), 4, 6(4), 45, 125
Companies Act 1965, s. 218
Islamic Banking Act 1983, ss. 2, 3

Other source(s) referred to:

Paget's Law of Banking, 6th edn, p 8

For the plaintiff - PS Gill; M/s Gill & Tang
For the defendant - Sivagurunathan (D Paramalingam with him); M/s Shamiah KE Ng & Siva)

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Rohana Yusuf J:

[1] Enclosure 2 is an application by the plaintiff for an interim injunction to restrain the defendant and its servants or agents from filing, presenting, advertising and or prosecuting a winding up petition against the plaintiff.

Background Facts

The defendant *vide* letter of offer in exh. CWM07 offered the plaintiff, a revolving trade line facilities up to a sum of RM5,600,000. In accordance with cl. (v) in the letter of offer, the plaintiff had utilised the said facilities on 17 separate occasions. In each of the transactions, the plaintiff had requested the defendant to purchase goods, mainly lighting products from a particular supplier, based on the quotations, proforma invoices or sale contracts. The defendant would accordingly purchase the required lighting products from the supplier, upon an undertaking that the plaintiff would buy the same from the defendant. This undertaking is made under the 'Promise to Purchase Agreement' (see exh. KIH1). The Promise to Purchase Agreement, (see cls. 1 and 3) contemplates that the plaintiff will thereafter, enter into a sale and purchase agreement to buy the said lighting products from the defendant. The terms of sale and the particulars of the lighting products will be spelled out in the sale agreement.

[2] In furtherance to the Promise to Purchase Agreement, the plaintiff and the defendant entered into a 'Murabaha Sale Agreement' (see exh. KIH1). By this Murabaha Sale Agreement, the defendant sold to the plaintiff the lighting products at an agreed price (see cl. 5). It is a material term of the Murabaha Agreement that the plaintiff would pay the purchase consideration by way of lump sum payment six months after the defendant made payment to the supplier. Thus, for each of the 17 transactions the parties had in fact entered into two sets of agreement *viz*; the Promise to Purchase Agreement and the Murabaha Sale Agreement, resulting in 17 Murabaha Sale Agreements being concluded between the parties, thus far.

[3] The plaintiff defaulted payment in 9 Murabaha Sale Agreements and the defendant's solicitor then, Messrs Abdul Raman Saad & Associate, issued a demand notice in exh. VJB03 to the plaintiff, claiming the amount outstanding. The plaintiff however, failed to comply with the said demand notice within the stipulated time. The present solicitor for the defendant subsequently issued a statutory notice under s. 218 of the Companies Act 1965 in exh. VJB4, demanding for the same.

[4] The plaintiff is now seeking an injunctive relief against a winding up petition being presented against it, on two main grounds; firstly, that there is multiplicity of proceedings and secondly, that the debt is being seriously disputed by the plaintiff. The plaintiff contends that there is multiplicity of proceedings because the same Murabaha Sale Agreements are being pursued under two existing civil suits. While the main contention for the disputing the debt is grounded on alleged illegality and invalidity of the agreements. It is the plaintiff's case that the Murabaha Sale Agreements entered between them are in contravention of the Banking and Financial Institutions Act 1989 (BAFIA), the Islamic Banking Act 1983 (IBA) and the Money Lenders Act 1951 (MLA). The contraventions, according to learned counsel for the plaintiff are pending determination in both the two civil suits and hence it should be disposed first before the defendant may be able to take drastic measure in presenting a winding up petition against the plaintiff.

Multiplicity Of Proceeding

[5] Let me first deal with the issue on alleged multiplicity of proceedings raised by the plaintiff. En P.S Gill of counsel of the plaintiff says that there will be multiplicity of proceedings between the demand in s. 218 notice and two civil suits filed by the defendant. According to him the two civil suits, which are pending in this court are in respect of the same Murabaha Sale Agreements as those in the s. 218 notice. The Kuala Lumpur High Court suit No. D4-22A-185-2008 (the 185 Claim) filed on 24 April 2008, is based on four Murabaha Sale Agreements while the Kuala Lumpur suit No. D4-22A-266-2008 (the 266 Claim) filed on 9 July 2008, is based on two Murabaha Sale Agreements. In both suits, the plaintiff had filed its defence and counterclaim and the defendant had filed its reply.

[6] From the affidavits of the defendant, it has been verified that the 9 Murabaha Sale Agreements, which are the subject matter of the s. 218 notice herein, are separate and distinct from the two civil suits (185 claim and 266 claim). Learned counsel for the defendant Encik Sivaguru, contends that the plaintiff has misled the court in making this submission. Bearing in mind that, in all there are 17 Murabaha Sale Agreements, the three tables below illustrate which of them are the basis of the claim by the defendant under the two suits and those in the s. 218 notice.

[7] Claim 185 is based on the following four Murabaha Sale Agreements described by the account numbers and dates of the agreements respectively:

Account No.	Date of the Agreement
00001/02/002444/5	28 June 2007
00001/02/002464/1	1 August 2007
00001/02/002474/4	13 August 2007
00001/02/002479/3	17 August 2007

Claim 266 is based on the following two Murabaha Sale Agreements with respective account numbers and dates:

Account No.	Date of the Agreement
00001/02/002506/1	19 September 2007
00001/02/002517/2	28 September 2007

While the s. 218 notice is based on the following 9 Murabaha Sale Agreements described by the respective account numbers and dates:

Account No.	Date of the Agreement
00001/02/002538/1	2 November 2007
00001/02/002560/4	3 December 2007
00001/02/002566/0	24 October 2007
00001/02/002576/9	24 December 2007
00001/02/002581/3	28 December 2007

Account No.	Date of the Agreement
00001/02/002585/4	8 January 2008
00001/02/002590/9	11 January 2008
00001/02/002591/1	11 January 2008
00001/02/002605/2	31 January 2008

From the above tables it is clear that the demand made by the defendant under s. 218 notice does not include the 6 Murabaha Sale Agreements in the two civil suits.

[8] The plaintiff had submitted erroneously an allegation of multiplicity of proceedings against the defendant here and had misled the court as to the facts because the subject of both suits, though based on similar Murabaha Sale Agreements, are not the same agreements as in the two civil suits. They are in fact based on the other nine agreements out of the 17 entered between the plaintiff and the defendant and the amount outstanding is RM1,682,245.26. Hence, it is clear that there is no multiplicity of proceedings. Thus, the objection raised by the plaintiff on the issue of multiplicity of proceedings is totally unwarranted and misleading. The plaintiff cannot event feign ignorance when the accounts numbers and date of the Murabaha Sales Agreements are clearly particularised in the statement of claims of both suits (see exh. VJB01 and VJB02) as well as the s. 218 notice.

[9] The duty to make full and frank disclosure of material facts is a requirement that the plaintiff must comply in an application of this nature. The conduct of the plaintiff in trying to mislead the court into believing that there is multiplicity itself is a good ground to refuse the injunctive relief sought. In *Malayan Banking Bhd v. Red Box (M) Bhd* [2000] 6 CLJ 21, the injunction against a winding up petition was refused and one of the grounds is, the respondent's failure to provide a frank and full disclosure at the time the respondent had obtained an *ex parte* injunction against the bank to restrain it from proceeding with a petition to wind up. At the *inter parte* hearing the application was accordingly dismissed by reason of such failure. The defendant in that case did not disclose that it has in fact admitted the outstanding debt to the bank. Abdul Malik Ishak J (now JCA) in his judgment at p. 33 observes that, "In other words there must be full, frank and sufficient

disclosure otherwise the application will, in the absence of special circumstances, be dismissed". Similarly, in the present case, the plaintiff's neglect to disclose that the agreements in the two suits and the s. 218 notice are not the same and instead suggests otherwise when alleging multiplicity of proceedings, amounts to a clear failure to provide a full and frank disclosure and is fatal to the plaintiff's case.

Agreement Invalid

[10] The next ground put forth by Encik P.S Gill for the injunctive relief is premised on the argument that the issues raised in both the two suits as well as s. 218 notice revolve around the issue of illegality of the agreements. He contends that these issues should be disposed first, before the defendant can present a winding up petition against the plaintiff.

[11] Based on the submissions of the counsels, I note that the disputes in the two civil suits centre on similar allegation of illegality. Though it is true that similar issues are pending in the two civil suits, in my view they are issues of law, involving the interpretations of the various provisions, which may be tried summarily in this application. As such, there is no necessity to wait for its determination in a trial proper. There is therefore no real basis to inject any presentation of a winding up petition pending the disposal of these issues.

Agreement Contravenes BAFIA

[12] In the allegation of illegality, first En P.S. Gill contends that the Murabaha Sale Agreement contravenes BAFIA because it is an agreement to provide financing, which the defendant is not authorised to do. The basis of En P.S. Gill's argument is that, the defendant is a company carrying out leasing business, which is a registered scheduled business under s. 2(1) and the Third Schedule of the BAFIA. By virtue of that registration, he argued that the defendant is not authorised to do any non-leasing business, either in the form of financing or banking. In support of his argument, En P.S. Gill had placed reliance on an e-mail communication issued by an officer of the Bank Negara Malaysia (the Bank) in response to the plaintiff's solicitor's inquiry (see exh. CWM01.) From the information in the e-mail, he says the defendant is restricted to do leasing business as defined in BAFIA. He further supported his argument on the basis that the

A defendant itself admitted that it was not licensed by the bank, when in exh. KIH2 the defendant disclosed that it does not possess a licence from the bank.

[13] En P.S. Gill contends that despite not being licensed, the B defendant is carrying out financing as a financial institution. This, according to him is evidenced from exhibits such as CMW02, CMW03 and CWM04, obtained from the defendant's own website, which advertises that the defendant provides financing product.

C **[14]** Encik P.S Gill further contends that the provision of financing by the defendant is in contravention of BAFIA because according to him, Banking Business includes financing which by virtue of s. 4 cannot be provided by the defendant without a valid license issued by the Bank under s. 6(4) BAFIA. As such, he D argued that the Murabaha Sale Agreement being an agreement to provide financing offended BAFIA and cannot be enforced.

[15] Encik Sivaguru for the defendant admitted that the defendant was not providing leasing product *per se* as per its E registered business in BAFIA. Learned counsel also argued that the defendant's business was not confined to leasing business just because it is registered as a leasing company under BAFIA. Though the transaction in question may be construed from the letter of offer as providing Islamic Finance to the defendant, it is F not however Banking Business under BAFIA.

[16] The argument by parties calls for interpretations of various provisions of BAFIA. I have perused the e-mail from the bank in CMW01. I am clear that the e-mail does not state that the G defendant is precluded from doing other business than leasing. The e-mail in CMW1 in essence discloses that the business under BAFIA permitted to be undertaken by the defendant is only leasing business. In the same token, it cannot be interpreted to mean that the defendant cannot undertake any other business H outside BAFIA.

[17] So the question next is whether the defendant is carrying out Banking Business without licence and hence contravenes BAFIA. Section 4 BAFIA provides that, no person shall carry on *inter alia* Banking Business or Financing Business without holding I a valid license granted under s. 6(4) BAFIA. Banking Business is defined in s. 2 to mean:

(a) the business of:

(i) receiving deposits on current account, deposit account, savings account or other similar account;

(ii) paying or collecting cheques drawn by or paid in by customers; and

(iii) provision of finance; or

(b) such other business as the Bank, with the approval of the Minister, may prescribe;

From the above definition, a person is carrying out Banking Business only if he is in the business of receiving deposits, paying and collecting cheques drawn by customer and providing financing or such other business prescribed by the Minister. Thus, Banking Business entails the acts of all these three transactions and not just any one of them. From the wordings of s. 2 all the three limbs must be read conjunctively and cannot be read disjunctively as suggested by Encik P.S. Gill. Therefore, if a person is providing only one of the businesses under the three limbs in s. 2, say merely providing financing as in this case, but not collecting deposit, such activity would not be sufficient to constitute Banking Business under this definition. It follows that, even if it is true that the defendant is providing financing in the Murabaha Sale Agreement, the provision of financing *per se* by the defendant is not a Banking Business and requires no license under s. 6(4) BAFIA. Section 6(4) requires licensing only if a person is carrying out, banking business, finance company business, merchant banking business or discount house business. All these businesses are clearly defined in s. 2 BAFIA.

[18] It is to be noted that even the definition of 'finance company business' in s. 2 entails receiving of deposit and provision of credit, leasing, hire purchase or acquiring rights and interest in hire purchase. In my view there is therefore no basis to say that the defendant has contravened any of the provisons in BAFIA in the transaction with the plaintiff.

[19] Even if I am wrong in my above finding and even if it can be argued that the transaction undertaken by the defendant is prohibited by BAFIA, I agree with the argument by Encik Sivaguru that s. 125 BAFIA would have saved the agreement.

Section 125 provides that an agreement in contravention of any provision of BAFIA cannot be avoided solely by reason of such contravention. Section 125 provides as follows:

> Except as otherwise provided in this Act, or in pursuance of any provision of this Act, no contract, agreement or arrangement, entered into in contravention of any provision of this Act shall be void solely by reason of such contravention.

Thus, notwithstanding any contravention of any provision in BAFIA, s. 125 would have saved the Murabaha Sale Agreement. The Supreme Court had held that a contract made in contravention of s. 45 BAFIA was saved by s. 125 in the case of *Coramas Sdn Bhd v. Rakyat First Merchant Bankers Bhd & Anor* [1994] 2 CLJ 143. This is because according to the Supreme Court, s. 45 does not declare that an agreement made against that section is void. Likewise, there is also no such provision to declare that an agreement made in contravention of s. 4 is null and void or illegal. In *RHB Sakura Merchant Bankers Bhd v. Tan Sri Dato' Ting Pek Khiing (No. 1)* [2004] 2 MLJ 315 the High Court followed the decision in *Coramas Sdn Bhd* on this point.

Agreement Contravenes IBA

[20] The next contention by the plaintiff is that the defendant had offended s. 3 of the IBA for providing Islamic Banking Business and holding itself out as an Islamic Bank without a licence under the IBA. A license is required in s. 3 IBA to operate an Islamic Bank. Islamic Banking Business is defined under s. 2 of IBA to mean, 'banking business whose aim and operation do not involve any element which is not approved by the religion of Islam'. Accordingly, Encik P.S Gill suggested that the Murabaha Sale Agreement is an Islamic Banking Business and since the defendant is not a licensed Islamic Bank it cannot enter into such transaction. Encik Sivaguru did not clearly argue this point, except to contend that the Murabaha Sale Agreement is not defined in BAFIA and it is a transaction authorised by the Memorandum of Association of the defendant.

[21] The issue remained to be determined begs the question of whether by entering into a Murabaha Sale Agreement *ipso facto* deems the defendant to carry out Islamic Banking Business and accordingly the defendant an Islamic Bank? It must be borne in mind that Islamic Banking Business by definition in IBA must first,

be a Banking Business and then, it must comply with the requirement of the Islamic Law. In other words not every transaction, which do not involve any element, which is not approved by the religion of Islam, becomes an Islamic Banking Business. Such interpretation would lead to absurdity. Taken to its extreme it is tantamount to saying that any transaction not prohibited by Islamic Law, such as operating a halal kway teow stall is Islamic Banking Business and accordingly to operate a halal kway teow stall requires license under IBA. Surely the Legislature cannot have intended such absurdity though the word Banking Business is not defined in IBA.

[22] In today's legislation of most jurisdictions, the term, Banking Business has been given statutory definition. Prior to that, in an old English decision, Lord Denning MR, described Banking Business in the case of *United Dominions Trust Ltd v. Kirkwood* [1996] 1 All ER 968 by taking into account historical analysis back to eighteenth country. Thus in that case (at p. 975) he found that, there are two characteristics found in bankers. First, they accept money from, and collect cheques for their customers and place them to their credit. Secondly, they honour cheques or orders drawn on them by their customers when presented for payment and debit their customers accordingly. He further states these two characteristics carry a third one that is they (banks) keep current accounts or something like that nature in their books where credits and debits are entered. This position is reinforced in *Paget's Law of Banking* (6th edn. at p. 8). The Australian court also defines Banking Business in the same way. In *PP Consultants Pty Ltd v. Finance Sector Union* [2000] HCA 59 the High Court of Australia in defining Banking Business observed as follows:

> The essential characteristics of the business of banking are "the collection of money by receiving deposits upon loan, repayable when and as expressly or impliedly agreed upon, and the utilization of the money so collected by lending it again in such sums as are required". It involves the creation of distinct debtor and creditor relationships between the bank and those who deposit money with it and also, between the bank and those who borrow from it.

[23] In the Privy Council decision from Malaysia *Koh Kim Chai v. Asia Commercial Banking Corp Ltd* [1984] 1 CLJ 281; [1984] 1 CLJ (Rep) 18, the Privy Council affirming the Federal Court decision in *Koh Kim Chai v Asia Commercial Banking Corporation*

Limited [1980] 1 LNS 128 held that providing a loan to customer in Singapore, secured by a third party charge on land situated in Malaysia is not Banking Business within the meaning of s. 2 of the Banking Act 1973 (now repealed by BAFIA). This was because Banking Business was defined under that repealed Act as to constitute the 3 limbs of transactions of receiving money on current or deposit account, paying and collecting cheques drawn by or paid in by customers, and making advances to customers and includes such other business as the Central Bank, with the approval of the Minister may prescribe. Thus making advances to customers *per se* is not sufficient to constitute Banking Business, hence no license is required to provide advances to customer. In *Arab-Malaysian Merchant Bank Bhd v. Silver Concept Sdn Bhd* [2006] 8 CLJ 9, Suriyadi J (now JCA) in pointing out the undefined Banking Business under IBA, had made reference to the definition of the same under BAFIA due to the paucity of adequate precedents and authority.

[24] Therefore, it can be safely concluded, as it also becomes amply clear from the above position, that Banking Business in IBA must necessitate that it is a business of taking deposit and provide financing as well issuing cheques. Providing financing alone is not carrying out Banking Business under IBA. Thus despite the exhs. CWM01, CWM02 and CWM03 advertising the defendant providing financing facilities, it cannot be said that the defendant is operating banking business either under BAFIA or IBA.

[25] I am also in agreement with the contention of Encik Sivaguru for the defendant that Murabaha Sale Agreement has not been defined in IBA or any law thereby not a regulated business transaction. I further agree with him that the Murabaha Sale Agreement is essentially a plain straight forward sale and purchase agreement, which the plaintiff agrees to be bound on its own free will. I will deliberate on the nature of Murabaha Sale Agreement in dealing with the next sub-heading in the foregoing paragraphs.

Agreement Contravenes MLA

[26] The next contention launched by Encik P.S. Gill is that the defendant is circumventing MLA in entering Murabaha Sale Agreement. He argued that the Murabaha Sale Agreement is a money lending transaction and by virtue of s. 2 it is an illegal agreement because the defendant has not been licensed under

that Act. For the defendant, it maintained the argument that, the Murabaha Sale Agreement is a trading transaction, which is in line with its objective and is within its Memorandum of Association shown in exh. KIH 2.

[27] It must be noted that the plaintiff never denies signing the Letter of Offer in exh. KIH 3. The plaintiff never denies signing the Murabaha Sale Agreements in question. It would then be crucial to examine the terms and purport of the Murabaha Sale Agreement. In the recital it is clearly stipulated that it was entered pursuant to the Promise to Purchase Agreement (as reiterated in Recital 1). Clause 3 further confirms that the Buyer (plaintiff) had inspected the conditions of the goods and found them to be free from defects and deemed to have accepted them without any further right to rescind on such grounds or to claim for any damages. Clause 4 provides for the purchase consideration. The mode of payment in cl. 5, obliged the plaintiff to pay the defendant six months from the date the defendant made the first payment to the supplier. These terms disclose that the parties intended and characterise a sale and purchase agreement. The transaction is nothing more than a simple sale and purchase agreement and this cannot be said to be offending MLA as suggested by the counsel for the plaintiff. I do not find any clause in the Murabaha Sale Agreement that can be construed to suggest a money lending transaction. The plaintiff cannot now give a different interpretation to the agreement that the plaintiff and the defendant had agreed in its plain clear language. The Murabaha Sale Agreement was entered on those premise and at their own freewill, it is not for this court to reclassify or reinterpret it as a Money Lending Agreement. It is also not for the plaintiff now to come to court to dispute what it has clearly agreed.

[28] If the plaintiff itself was conspiring with the defendant, to circumvent the MLA, then the plaintiff is doing so at its own peril. That being the case the plaintiff is not entitled to an equitable relief that it is now seeking. It is a well established principle that no man can take advantage of his own wrong based on the legal maxim *'nullus commodum capere potest de injuria sua propri'*. This principle is supported by a long line of authority and requires no further deliberation. In the Supreme Court case of *Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd* [1987] 1 CLJ 123; [1987] CLJ (Rep) 102, upon a finding that reliance on

A certain clause of a contract would entitle the defendant to benefit from its own wrong Wan Hamzah SCJ finds that a blameable party cannot take advantage of his own wrong to end a contract. He summarised the proposition in the following terms:

B
> The rule is that if a stipulation in a contract be that the contract shall be void on the happening of an event which one or either of the parties can by his own act or omission bring about, then the party who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party who is blameless, to insist
C upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong to put an end to the contract.

[29] In *Dato' Abd Rahim Mohamad v. Abdul Farish Rashid* [2009] 1 CLJ 395, a decision of the Appeal Court, Gopal Sri Ram JCA
D in his oral judgment held *inter alia* that "... there is a presumptive rule of construction that a party is not to be permitted to take advantage of his own wrong."

[30] Based on the above authorities, in my view, it would be an
E affront to public conscience to grant the relief that the plaintiff is seeking.

[31] Encik P.S Gill further submitted that, if the Murabaha Sale Agreement is not to be construed as money lending agreement
F MLA can be circumvented by any person entering into this agreement, masquerading it as a sale and purchase agreement for want of compliant with Islamic principle. He suggested that there is therefore a lacuna in the MLA. If it is true, there is a lacuna and an abuse by the companies to circumvent MLA by entering
G into Islamic compliant transactions, there are governmental authorities both religious and financial to address them, in line with the policies of the government. The court should not be too quick to interfere and meddle in a matter of policy and to impose a constraint on a subject matter, which is not intended to be
H regulated by any legislation.

[32] The rule on interpretation of statutes and the contractual documents are what the court will have to adhere to. The court cannot simply abandon basic rules of interpretation merely on any
I flimsy suggestion of a lacuna. Even if one is to understand that the objective of MLA is to protect consumers against the wrath of moneylenders, the plaintiff here is a sophisticated borrower, a

trading company having been in the business transaction over the years. It entered into the Murabaha Sale Agreement well informed and on its own free will. I would not be wrong to presume that the plaintiff would have had various other options getting financing for its business. The plaintiff chose the offer made by the defendant on its own freewill. What is regrettable is that having agreed to be bound by the terms of the contract, and benefiting from it, the plaintiff now turns around to challenge the very transaction it entered as having contravened the laws, which the plaintiff ought to have been aware of in the first place. To my mind, this category of plaintiffs cannot invoke any assistance of this court for an equitable relief.

Law On Restraining Winding Up

[33] I do not agree with both counsel's submission that I should apply the test in the *American Cyanamid Company v. Ethicon* [1975] 2 AC 396 in deciding whether to grant the injunctive relief sought by the plaintiff. The law on the principles of restraining a winding up petition is found in the various decisions of the court. It is an axiomatic principle of law that presentation of a winding up petition may be restrained by way of injunction where its presentation is an abuse of court process. That being the case, it is not sufficient for the applicant to merely raise triable issue to obtain the injunctive relief against petition for winding up but the plaintiff must indeed establish that there is a *bona fide* dispute of the debt on substantial ground. The Court of Appeal case of *Tan Kok Tong v. Hoe Hong Trading Company Sdn Bhd* [2007] 2 CLJ 305 which cite with approval, the High Court decisions in *Natseven TV Sdn Bhd v. Television New Zealand Ltd* [2001] 4 CLJ 722 and *Molop Corporation Sdn Bhd v. Uniperkasa (Malaysia) Sdn Bhd* [2003] 1 LNS 280 acknowledges that, the test in *American Cyanamid* of raising triable issue does not apply. The plaintiff will have to raise more than just a triable issue, instead the plaintiff must either mount up a *prima facie* case by necessary evidence that the debt is in *bona fide* dispute or that the plaintiff is solvent. The plaintiff here is not denying the debt, but instead raises issues; on the erroneous allegation of multiplicity of proceedings and that, the agreements flout the BAFIA, IBA and the MLA. I cannot agree with all these contentions as I have earlier addressed each of the points raised. No attempt is made to raise a *bona fide* dispute of the debt or that the plaintiff is solvent. In fact, it would have been

more appropriate for the plaintiff to raise all these issues at the winding up petition itself. As observed by Abdul Hamid Mohammad JCA (who later became the Chief Justice) in *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals* [2001] 3 CLJ 248, that there is an unhealthy trend among respondents in a winding up petition to make all kinds of interlocutory application to stall the hearing of petition proper, and should be discouraged. The arguments should be brought to the winding up court instead.

[34] Based on the foregoing, I am satisfied that the plaintiff has not established a *prima facie* evidence to dispute the debt for me to restrain a winding up petition be presented against the plaintiff. For all the above reasons, I hereby dismiss the application of the plaintiff in encl. 2 with costs.